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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

LOUIE L. WAINWRIGHT
Secretary,
Florida Department of Corrections,

Petitioner,

vs.

OSCAR BROWN BOYKINS, JR.

Respondent.

Petition for Writ of Certiorari
to the United States
Court of Appeals for the
Eleventh Circuit

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93pp

QUESTIONS PRESENTED

I.

WHETHER THE ELEVENTH CIRCUIT IGNORED THIS COURT'S HOLDING IN ENGLE V. ISAAC, 456 U.S. 107 (1982), WHEN IT REVERSED A DISTRICT COURT WHICH HAD DENIED A PETITION FOR WRIT OF HABEAS CORPUS, AND CONSIDERED ON THE MERITS, WITHOUT EITHER A SHOWING OR FINDING OF CAUSE AND PREJUDICE, AN ISSUE OF STATE EVIDENTIARY LAW OVER WHICH THE FEDERAL COURTS HAD NO SUPERVISORY AUTHORITY AND WHICH IN THE STATE COURTS HAD NOT BEEN RAISED IN TERMS OF FEDERAL EVIDENTIARY LAW ON DIRECT APPEAL AND HAD NOT BEEN RAISED AT ALL ON COLLATERAL ATTACK?

II.

WHETHER THE COURT OF APPEALS IGNORED THIS COURT'S OPINION IN WAINWRIGHT V. GOODE, ___ U.S. ___, 78 L.Ed.2d 187

(1983), AND LISENBA V. CALIFORNIA, 314 U.S. 219 (1941), WHEN IT REVIEWED, UNDER THE GUISE OF DUE PROCESS AND A DENIAL OF FUNDAMENTAL FAIRNESS, A QUESTION OF STATE EVIDENTIARY LAW WHICH HAD NOT BEEN RAISED IN THE STATE COURTS IN TERMS OF FEDERAL CONSTITUTIONAL LAW AND WHICH HAD BEEN REJECTED AS A MATTER OF STATE LAW BY A STATE APPELLATE COURT?

III.

WHETHER 28 U.S.C. §2254(d) PERMITS A FEDERAL COURT TO CONTRAVENE STATE LAW THAT EXPERT PSYCHIATRIC TESTIMONY, WHICH DOES NOT GO TO WHETHER THE DEFENDANT WAS SANE AT THE TIME OF THE CRIME, IS IRRELEVANT AND THUS INADMISSIBLE IN A CASE INVOLVING A STATE LAW DEFENSE OF INSANITY, IN LIGHT OF THE COURT'S OPINION IN FISHER V. UNITED

STATES, 328 U.S. 463 (1946), WHICH HELD THAT THE CONSTITUTION DID NOT REQUIRE THE DISTRICT OF COLUMBIA TO MAKE SUCH TESTIMONY RELEVANT TO AN INSANITY DEFENSE?

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS.....i

OPINIONS BELOW.....1

JURISDICTION.....2

CONSTITUTIONAL PROVISIONS INVOLVED.....3

STATEMENT OF THE CASE.....4

REASONS WHY THE WRIT SHOULD BE GRANTED.....17

CONCLUSION.....31

APPENDIX.....

TABLE OF CITATIONS

CASES	PAGE
Anderson v. Harless, ___ U.S. ___, 74 L.Ed.2d 3 (1982)	12, 17, 19
Barclay v. Florida, ___ U.S. ___, 77 L.Ed.2d 1134	29
Boykin v. State, 305 So.2d 831 (Fla. 1st DCA 1975)	1, 10
Boykin v. State, 375 So.2d 52 (Fla. 1st DCA 1979)	1
Boykins v. Wainwright, 737 F.2d 1539 (11th Cir. 1984)	1, 15, 20,21, 20
Brown v. State, 245 So.2d 68 (Fla. 1971), vacated on other grounds, 408 U.S. 938 (1972)	23
Campbell v. State, 227 So.2d 873 (Fla. 1969), cert. dismissed, 400 U.S. 801 (1970)	23, 27
Chambers v. Mississippi, 410 U.S. 284 (1973)	24
Engle v. Isaac, 456 U.S. 107 (1982)	16, 17, 19, 20, 21, 22 26, 29, 30

Evans v. State,
140 So.2d 348
(Fla. 2d DCA 1962) 24

Fisher v. United States,
328 U.S. 463 (1946) 26, 27, 28, 30

Francis v. Henderson,
425 U.S. 536 (1976) 12

Green v. Georgia,
442 U.S. 95 (1979) 24

Gryger v. Burke,
334 U.S. 728 (1948) 29

Hutto v. Davis,
454 U.S. 370 (1982) 32

United States v. Frady,
456 U.S. 152 (1982) 22

Wainwright v. Douglas,
Case No. 84-502,
cert. pending 31

Wainwright v. Goode,
___ U.S. ___, 78 L.Ed.2d 187
(1983) 22, 26, 29, 31

Wainwright v. Henry,
___ U.S. ___,
77 L.Ed.2d 1407
(1983) 31

Wainwright v. Sykes,
433 U.S. 72 (1977) 11, 17

Wheeler v. State, 344 So.2d 244 (Fla. 1977) 23, 27

Young v. State, 140 So.2d 97 (Fla. 1962) 28

OTHER AUTHORITES

28 U.S.C. §1254(1) 2

28 U.S.C. §2254(d) 11

§812.13, Fla. Stat. 4

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is reported at Boykins v. Wainwright, 737 F.2d 1539 (11th Cir. 1984) (A-1-32). That opinion reversed an unpublished order of the United States District Court for the Middle District of Florida which had denied Respondent's petition for writ of habeas corpus (A-33-35). The opinion of Florida's First District Court of Appeal which had affirmed the trial court's denial of Respondent's collateral attack is reported at Boykin v. State, 375 So.2d 52 (Fla. 1st DCA 1979) (A-36). The denial of Respondent's direct appeal is reported at Boykin v. State, 305 So.2d 831 (Fla. 1st DCA 1975) (A-37-38).

JURISDICTION

The opinion of the Eleventh Circuit Court of Appeals was rendered August 3, 1984. The State's Petition for Rehearing and Suggestion for Rehearing En Banc was denied on September 7, 1984. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

APPENDIX

Petitioner has included in the Appendix to this petition the Eleventh Circuit's 2 to 1 opinion upon which review is sought, the federal district court's opinion which denied the petition for writ of habeas corpus, and relevant excerpts from Respondent's direct appeal brief, the trial transcript, the motion to strike filed in the district court, and the pre-evidentiary hearing stipulation. Other portions of the record are available should the Court request them.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, excepting cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Fourteenth Amendment of the United States Constitution provides in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

Respondent was convicted of robbery in violation of §812.13, Fla. Stat., and sentenced to life imprisonment. The incident which resulted in Respondent's conviction occurred on August 8, 1973, when Respondent entered an antique shop in Jacksonville, Florida, pulled a gun on

the proprietor, robbed her of ten dollars, and beat her. Respondent was arrested immediately by police who happened to be nearby.

Because Respondent had vitually been caught red-handed in the crime, his only defense at trial was insanity. Respondent's counsel obtained authorization from the trial court to have a court appointed psychiatrist, Dr. Ernest Miller, examine Respondent. Dr. Miller concluded that Respondent was competent to stand trial but that he had been insane at the time of the offense. The State then had Respondent examined by two psychiatrists who both concluded that Respondent was competent to stand trial and that he had been sane at the time of the offense.

During the trial, Respondent called as his first witness, Dr. Jesus Rodriguez, who had treated Respondent at the Florida State Hospital for a period of three years although Dr. Rodriquez had last examined Respondent eight months prior to the robbery. Respondent's trial counsel sought to elicit from Dr. Rodriquez testimony relating to Respondent's prior history of mental illness, including information which related to the possibility that Respondent's symptoms might have reoccurred after he had been released from the mental hospital. However, the State's objection was sustained on the ground that it was not relevant to Respondent's mental condition at the time of the offense. When the objection

was sustained, the trial court stated that since Respondent had been found competent by the doctors at the mental hospital in January 1973, when he had been released, any evidence of mental illness prior to that time could not be relevant to Respondent's subsequent mental condition.

Over objection by the defense, Dr. Rodriquez was not permitted to listen to the testimony of the other psychiatrists which had examined Respondent just after the robbery. Respondent's only other witness was Dr. Miller who testified that Respondent had been insane at the time of the offense. The State introduced the testimony of its two psychiatrists who both testified that Respondent was sane at the time of the offense. The State also introduced

a lay witness who testified that Respondent was sane at the time of the robbery.

After Respondent was convicted by a jury, he appealed to Florida's First District Court of Appeal. On this appeal, Respondent claimed that Dr. Rodriquez should have been allowed to testify about his past mental problems because they were "highly relevant." (Appellant's brief at 11). During the colloquy between the trial court and defense counsel, defense counsel specifically stated that Dr. Rodriquez would be unable to testify concerning Respondent's competency at the time of the offense (trial transcript at 166). No mention was made of due process or the federal constitution at any time

in the trial transcript or in the two pages devoted to the argument in Appellant's brief on direct appeal. The only argument made was that Appellant's past mental condition was relevant to what might have occurred on the day of the crime. The trial court specifically disagreed and stated that he did not believe it was relevant since the doctor's last contact with Respondent had been when he declared Respondent competent to leave the hospital (trial transcript at 167). However, the trial court granted a recess in order to permit trial counsel to research the issue. When court reconvened, Respondent's trial counsel specifically agreed with the trial court and stated that "I think you are

right on the law." (Trial transcript at 173). Defense counsel was permitted to ask Dr. Rodriguez a hypothetical question based on the facts of the case, and Dr. Rodriquez explained that it was his opinion that Respondent was psychotic and that a person who was psychotic did not know right from wrong (trial transcript at 183).

Respondent's direct appeal was denied although the issue of whether Dr. Rodriquez should have been permitted to testify was not discussed by the appellate court. Boykins v. State, 305 So.2d 831 (Fla. 1st DCA 1975). Although Respondent filed a subsequent collateral attack, this issue was not raised.

Respondent then filed a petition

for writ of habeas corpus pursuant to 28 U.S.C. §2254(d) in the Middle District of Florida. During the proceedings in the district court, both parties stipulated that it was the State's contention that Respondent had waived all claims raised in the petition for writ of habeas corpus except the claim of ineffective assistance of counsel. Counsel for the State also filed a motion to strike in which it was alleged that the only issue cognizable on federal habeas corpus was the alleged ineffective assistance of trial counsel claim and that all other issues were barred because of Respondent's unexcused procedural defaults in the state courts under Wainwright v. Sykes, 433 U.S. 72 (1977),

and Francis v. Henderson, 425 U.S. 536 (1976).

Although the State of Florida had argued procedural default, the district court did not reject that doctrine but instead adopted the magistrate's report and recommendation which had found that if there had been error at all, the error had to be harmless. On appeal to the Eleventh Circuit, the State of Florida argued that the issue was barred from consideration on federal habeas corpus because of Respondent's un-excused procedural defaults in the state courts in that Respondent had not raised the issue in terms of federal constitutional law. The State of Florida cited Anderson v. Harless, ___ U.S. ___, 74 L.Ed.2d 3, 7 (1982),

which stands for the proposition that before a federal claim can be considered fairly presented to the state courts, the claim must be presented in terms of federal constitutional law. The State pointed out that Respondent's argument on direct appeal in the state courts had been that Dr. Rodriquez's testimony should have been admitted because it was relevant and that there had been no mention at any stage in the proceedings that the restriction of Dr. Rodriguez's testimony was a denial of due process.

The Court of Appeals rejected the State's argument and concluded that the State was barred from raising procedural default because it had not argued procedural default in the federal district court. The court did

not mention the stipulation which had been signed by both parties and the court commented in a footnote that the motion to strike had not been specific:

> At oral argument before this Court, the State claimed that it had raised the waiver issue before the district court in its motion to strike. That motion did assert that certain of Boykins's claims had been waived, but did not identify those claims except by reference to Boykins's state habeas petition in which he acknowledged not having pursued certain arguments on direct appeal. His "Rodriquez" claim was not among those he admitted to have neglected. The State's motion to strike did not attempt to explain the distinction between Boykins's state evidence law claim, which he did raise on direct appeal, and his federal constitutional claim. Consequently, we are unwilling to

> hold that Boykins has forfeited his right to raise the constitutional claim because he made the same error on direct appeal.

Boykins v. Wainwright, 737 F.2d 1545.

After rejecting the argument that the issue was not cognizable on federal habeas corpus because of unexcused procedural default, the Court of Appeals then devoted a lengthy discussion to its understanding of federal habeas law, i.e., that federal courts did not sit to second-guess on federal habeas corpus state evidentiary rulings. However, the Court of Appeals then did precisely that and held that "Dr. Rodriquez's excluded testimony was material in that it was a crucial, critical, highly significant factor in Boykins's defense." Id. at 737 F.2d

1544.

The State then filed a Petition for Rehearing and Suggestion for Rehearing En Banc in which it was argued that (1) the Court of Appeals had erroneously rejected the procedural default argument under Engle v. Isaac, 456 U.S. 107 (1982), (2) that state evidentiary questions should not be considered on federal habeas corpus, and (3) once the state evidentiary question was reached, the court had erroneously applied Florida law which held that Dr. Rodriquez's testimony was irrelevant since it could not go to Respondent's sanity at the time of the offense. The motion was denied, and the State then sought certiorari in this Court.

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

THE ELEVENTH CIRCUIT REFUSED TO APPLY THE PROCEDURAL DEFAULT DOCTRINE OF ENGLE V. ISAAC, 456 U.S. 107 (1982) AND WAINWRIGHT V. SYKES, 433 U.S. 72 (1977), TO AN ISSUE WHICH HAD NEVER BEEN PRESENTED TO THE STATE COURTS IN TERMS OF FEDERAL CONSTITUTIONAL LAW.

In Engle v. Isaac, 456 U.S. 107, 119 (1982), the Court reiterated that habeas relief could not be obtained by inmates who allege no deprivation of federal rights. In Anderson v. Harless, ___ U.S. ___, 74 L.Ed.2d 3, 7 (1982), the Court explained that in order to have presented a federal claim adequately to the state courts, a habeas petitioner must have done more than merely present all the facts

necessary to support the federal claim.

It cannot be disputed that Respondent's federal claim concerning Dr. Rodriquez's testimony was never presented in terms of federal constitutional law in the state courts. At trial, the State's objection was sustained on relevancy grounds, and the trial transcript reveals that even Respondent's counsel later admitted that the trial court had been correct that Dr. Rodriquez's testimony would have been irrelevant under Florida law. (A-45) On direct appeal, Respondent again argued that Dr. Rodriquez's testimony about Respondent's past mental problems should have been allowed because it was relevant. No mention was made of the United States Constitution or due process. (A-46-49

On appeal to the Eleventh Circuit Court of Appeals, the State of Florida argued that under Engle, supra, and Anderson v. Harless, supra, Respondent's federal claim was not cognizable on federal habeas corpus because he had neither alleged nor proven the requisite cause and prejudice which would excuse the default in the state courts. The Eleventh Circuit, although recogizing that the State had claimed it had raised the procedural default issue in a motion to strike which had been filed in the district court, declined to find default because the State's waiver argument had not been specific. The Court did not address the pre-evidentiary hearing stipulation (A-42) in which both parties agreed that the State's argument was that the only

claim which was cognizable on federal habeas corpus concerned ineffective assistance of trial counsel.

Thus, it is clear that the Court of Appeals refused to apply Engle even though the Court all but admitted that Respondent had never raised the issue in the state courts in terms of federal constitutional law. See Boykins v. Wainwright, 737 F.2d at 1545, n. 3. Apparently the Eleventh Circuit felt that despite the motion to strike and despite the stipulation to the contrary, Florida had never argued default in the district court. However, the Eleventh Circuit's reasons for not applying the default doctrine should not bar certiorari because the court's reasons are not supported by the record, and, in fact,

were specifically rejected by this Court in Engle at 456 U.S. 124, n. 26.

It should be readily apparent that the Eleventh Circuit has completely turned the procedural default doctrine on its head. It cannot be disputed from both the objections and arguments made at trial and Respondent's brief on direct appeal in the state courts that federal due process was never argued. However, when the State argued default in the federal courts, the Eleventh Circuit found that the State was in default and declined "to hold that Boykins has forfeited his right to raise the constitutional claim because he made the error on direct appeal." Boykins v. Wainwright, supra.

The State submits that certiorari should be granted because this is

precisely the type of abuse of federal habeas corpus which Engle and United States v. Frady, 456 U.S. 152 (1982), sought to avoid.

II.

THE ELEVENTH CIRCUIT SHOULD NOT HAVE REVIEWED, UNDER THE GUISE OF DUE PROCESS AND A DENIAL OF FUNDAMENTAL FAIRNESS, A STATE EVIDENTIARY QUESTION.

In Wainwright v. Goode, ___ U.S. ___, 78 L.Ed.2d 187, 192 (1983), this Court was forced to vacate summarily a habeas corpus opinion written by the Eleventh Circuit because that court had decided that the state court had erroneously applied state law. Apparently, the Eleventh Circuit has not learned its lesson since in Respondent's case, the Eleventh Circuit concluded that Dr. Rodriquez's

testimony about Respondent's past mental problems was relevant to Respondent's defense, i.e., whether Respondent was insane at the time of the crime.

While the State of Florida would not disagree with the fact that a state could make such testimony relevant to a defense of insanity, that certainly is not the law in Florida. Under Florida law, evidence which does not go toward proving or disproving an individual's ability to distinguish right from wrong at the time of an incident is irrelevant under the McNaughton rule. See Wheeler v. State, 344 So.2d 244, 246 (Fla. 1977); Campbell v. State, 227 So.2d 873, 877 (Fla. 1969), cert. dismissed, 400 U.S. 801 (1970); Brown v. State, 245 So.2d

68, 71 (Fla. 1971), vacated on other grounds, 408 U.S. 938 (1972); Evans v. State, 140 So.2d 348, 349 (Fla. 2d DCA 1962).

The Eleventh Circuit's reliance on Chambers v. Mississippi, 410 U.S. 284 (1973), and Green v. Georgia, 442 U.S. 95 (1979), to support its ruling is misplaced. This is because both of those cases involved questions of whether testimony which would have shown that the crimes were not committed by the defendants should be excluded because of hearsay. In Respondent's case, however, even the Eleventh Circuit found that there was no question that he had committed the crime, and, in fact, the only question concerned Respondent's mental status at the time of the crime. Under

Florida law, had Dr. Rodriquez been able to testify that Respondent was insane at the time of the crime, the doctor certainly would have been permitted to testify about past mental problems. But since the doctor was unable to state that it was his opinion that Respondent was insane at the time of the offense, his testimony about Respondent's past mental problems was irrelevant--this should be especially true in light of the fact that it was Dr. Rodriquez who found Respondent competent to leave the mental hospital and the fact that Dr. Rodriquez had not even spoken with Respondent prior to trial. See dissenting opinion A-29.

The State of Florida submits that certiorari should be granted because the Eleventh Circuit has made a federal

issue out of a question of state law which it should never have reached in the first place. This is not what the writ of habeas corpus was designed to do, and the State of Florida respectfully urges the Court not to countenance any longer the Eleventh Circuit's either inability or unwillingness to follow this Court's decisions in Wainwright v. Goode and Engle v. Isaac.

III.

THE ELEVENTH CIRCUIT INCORRECTLY HELD THAT DUE PROCESS PREVENTED A STATE FROM MAKING EXPERT TESTIMONY ABOUT PAST MENTAL PROBLEMS IRRELEVANT TO THE QUESTION OF WHETHER A DEFENDANT KNEW RIGHT FROM WRONG AT THE TIME OF HIS CRIME.

In Fisher v. United States, 328 U.S. 463 (1946), this Court squarely rejected an argument that the

Constitution required that evidence of legal irresponibility be made relevant to the ultimate issue of insanity. The Court recognized that certain jurisdictions had adopted that theory, but the Court also recognized that it would not be prudent to force jurisdictions to adopt such a requirement for criminal trials because that would involve a fundamental change in the common law theory of responsibility. See Fisher at 328 U.S. 476.

Under the Florida law previously stated in this petition, Florida has chosen to make expert psychiatric testimony irrelevant unless the witness can testify that at the time of the crime, the defendant was unable to tell right from wrong. See, e.g., Wheeler v. State, supra, and Campbell v. State,

supra. In fact, the Florida Supreme Court expressly relied upon Fisher in Young v. State, 140 So.2d 97, 100 (Fla. 1962), which held that it was not error to preclude expert testimony which would not tend to prove the defendant knew right from wrong:

> When a defendant in a criminal case in this state relies on the defense of insanity, the issue is limited to whether or not the defendant has the ability to distinguish right from wrong and to know that the act he is charged with committing was wrong. The test does not depend on the intelligence, education or general mental capacity of the accused. [citations omitted] Fisher v. United States, 328 U.S. 463.

The Eleventh Circuit has chosen to disregard Florida law and has instead

fashioned its own law based on what it thinks should be relevant to a defense of insanity. Such a determination might be permitted if the Eleventh Circuit had supervisory authority over Florida courts, but since the Eleventh Circuit clearly does not, such a determination is highly inappropriate on federal habeas corpus. As this Court has stated numerous times, a state court's determination of its own law is binding upon federal court. Wainwright v. Goode, supra. Moreover, even if a state court incorrectly determines state law, it still does not present a federal question. Barclay v. Florida, ___ U.S. ___, 77 L.Ed.2d 1134, 1145, n. 8, citing Engle v. Isaac at 456 U.S. 121, n. 21, and Gryger v. Burke, 334 U.S. 728 (1948).

Of course, under Fisher, Florida law is not improper and does not violate the Constitution.

Petitioner submits that the Court should not be misled by the portion of the Eleventh Circuit's opinion which stated that the State had not offered a reason for excluding Dr. Rodriquez's testimony. See Boykins v. Wainwright, at 731 F.2d 1545. Although reasons were not argued until the Petition for Rehearing was filed, this is because the State's theory, both in the district court and the Eleventh Circuit, was procecural default under Engle. In fact, it would have been inappropriate to argue the merits of an issue when those merits had not been argued in the lower court. Moreover, the fact that the merits were not raised by the State

further supports the State's procedural default argument.

CONCLUSION

Certiorari should be granted because the Eleventh Circuit has demonstrated that it is either unwilling or unable to follow this Court's decisions. See, e.g., Wainwright v. Goode, supra; and Wainwright v. Henry, ___ U.S. ___, 77 L.Ed.2d 1407 (1983). In fact, this Court had to vacate the Henry opinion twice. See also Wainwright v. Douglas, Case No. 84-502, cert. pending, which has already been vacated once by this Court but is back again because the Eleventh Circuit refused to alter its opinion.

Petitioner submits that summary reversal is appropriate for the first two issues presented in this petition.

Petitioner also suggests that this case might be appropriate for an admonishment similar to that made by the Court in Hutto v. Davis, 454 U.S. 370 (1982).

Concerning the third issue, Petitioner respectfully requests the Court to grant certiorari to decide the issue of whether due process requires a state which follows the McNaughton rule to make relevant expert psychiatric testimony which does not relate to the defendant's mental condition at the time of the offense.

Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS

PAGE

Opinion of the Eleventh Circuit Court of Appeals.....A-1

Opinion of the United States District Court.....A-33

Opinion of the First District Court of Appeal.....A-36

Opinion of the First District Court of Appeal on direct appeal.....A-37

Motion to Strike.....A-39

Pre-Evidentiary Hearing Stipulation.....A-42

Excerpts from Trial Transcript.....A-44

Excerpts from Appellant's Initial Brief.....A-46

OSCAR BROWN BOYKINS, JR.,

Petitioner-Appellant,

v.

LOUIE L. WAINWRIGHT,

Respondent-Appellee.

No. 82-3086.

United States Court of Appeals,
Eleventh Circuit.

Aug. 3, 1984.

Before KRAVITCH and JOHNSON, Circuit Judges, and LYNNE, District Judge.

JOHNSON, Circuit Judge:

The petitioner, Oscar Brown Boykins, was convicted of robbery in violation of Fla. Code Ann. § 812.13 and sentenced to life imprisonment. Boykins appeals from the denial of his petition for a writ of habeas corpus. We find the petitioner's claim that he was denied effective assistance of counsel at his trial is without merit. Nevertheless, we reverse the dis-

trict court's denial of the writ because the trial court's limitation of the scope of a key defense witness's testimony denied the petitioner the right to present witnesses in his own defense in violation of the due process clause of the Fourteenth Amendment.

On the morning of August 8, 1973, Boykins walked into an antique shop in Jacksonville, Florida. After feigning interest in some merchandise, he pulled a gun on the proprietor, robbed her of ten dollars, and beat her. Police who happened to be near the scene immediately arrested Boykins. He was charged with robbery and aggravated assault.

Boykins's case was assigned to Stephen Donahoe of the Public Defender's Office. Mr. Donahoe obtained authorization to have a court-appointed psychiatrist, Dr. Ernest Miller, examine Boykins. Dr. Miller concluded taht Boykins was competent to stand

trial but that he had been insane at the time of the offense. The State then obtained permission to have Boykins examined by two psychiatrists of its own. In late November 1973, Mr. Donahoe transferred from his position in the Public Defender's Office, and Assistant Public Defender Ronald Cosgrove assumed the defense of Boykins's case. Cosgrove first visited Boykins on December 2, two weeks before the scheduled opening of the trial. On December 13, four days before trial, the prosecution filed the reports of its doctors with the court. Both of the state's psychiatrists concluded that Boykins was competent to stand trial and sane at the time of the offense. Cosgrove sought neither to depose these potential witnesses nor to obtain a continuance.

At the trial, Cosgrove raised only the defense of insanity. His first witness, Dr. Jesus Rodriguez, had treated Boykins

for mental illnesses for three years at the Florida State Hospital at Chattahoochee. Dr. Rodriguez had last examined Boykins less than eight months before the robbery. Cosgrove sought to elicit from Dr. Rodriguez testimony relating to Boykins's history of mental illness, a diagnosis of his condition (paranoid schizophrenia), and information relating to the chance that Boykins's symptons might have reoccurred after his release from Chattahoochee. The trial court sustained an objection to introduction of this testimony on the ground that it was not relevant to Boykins's mental condition at the time of the offense. The court stated that, because the officials at Chattahoochee had judged Boykins "competent" in January 1973, any evidence of mental illness prior to that time could not be relevant to evaluation of Boykins's subsequent mental condition. The court limited Dr. Rodriguez

to answering a hypothetical question whether, given the defendant's conduct on August 8, 1973, the doctor felt Boykins was sane at that time. Cosgrove's only other witness was Dr. Miller. The prosecution then called its two psychiatrists as well as one lay witness who was present at Boykins's arrest, all of whom testified that he was sane at the time of the robbery. The jury convicted Boykins of robbery, and the court sentenced him to life imprisonment.

Boykins filed a timely notice of appeal, and on January 9, 1975, the state appellate court affirmed his conviction. *Boykin [sic] v. State*, 305 So.2d 831 (Fla.Dist.Ct.App. 1975). On August 14, 1978, Boykins filed a motion for post-conviction relief, which was summarily denied on October 29, 1978. That denial was affirmed on appeal. *Boykin v. State*, 375 So.2d 52 (Fla.Dist.Ct.App. 1979).

His state remedies having brought no relief, Boykins filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida on November 21, 1979). The United States Magistrate held an evidentiary hearing and filed a report recommending that the court deny the petition. On August 16, 1982, the district court adopted the magistrate's report and recommendations and denied the writ. Boykins appeals.

1. INEFFECTIVE ASSISTANCE OF COUNSEL

Boykins first claims that the assistance that Cosgrove rendered during his trial was ineffective. He points out that Cosgrove was assigned the case just two weeks before trial and had time to interview Boykins only once prior to the trial date. Nevertheless, Cosgrove never requested an extension of time, not even after receiving the damaging reports of the government's

experts just four days before the trial. Furthermore, Cosgrove's work load was very heavy, amounting to 250 to 300 felony defendants per year. Despite this huge caseload, Cosgrove was inexperienced to the extent that he had apparently never participated in a trial in which the defense was insanity.

Boykins alleges that Cosgrove committed a number of specific errors that severely prejudiced his defense. The first is Cosgrove's failure to interview the state's psychiatrists, the critical witnesses against Boykins, before the trial. Because Boykins's defense depended in large part on Cosgrove's handling of these witnesses, Boykins claims that neglecting even to interview them rendered Cosgrove's conduct of the defense ineffective. Nor did Cosgrove interview any relatives or friends of Boykins to collect lay evidence of his mental state

around the time of the robbery. Boykins testified that Mr. Donahoe, his original counsel, had planned to pursue such testimony. Finally, Boykins argues that Cosgrove should have demanded a pretrial competency hearing and have raised the fact that Boykins was being sedated at trial as treatment for mental illness.

[1] The Sixth Amendment guarantees to criminal defendants the assistance of counsel. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

> That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.
>
> For that reason, the [Supreme] Court has recognized that "the right to counsel is the right to the effective assistance of counsel."

Strickland v. Washington, ___ U.S.___, ___, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984). The Supreme Court has recently explicated the principles that should guide courts facing claims of ineffective assistance of counsel. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper function of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 2064. A convicted defendant who seeks to challenge his conviction on the grounds that his counsel failed to render constitutionally sufficient assistance must make two showings.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair

> trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 2064.

Because we find that Boykins has failed to make the required showing of prejudice, we will proceed directly to that issue. *See id.* at 2069-2070. In *Strickland*, the Supreme Court reaffirmed the principle that "any deficiencies in counsel's performance must be prejudicial in order to constitute ineffective assistance under the Constitution." *Id.* at 2067. Prior to *Strickland*, the standard for what constituted sufficient prejudice varied among the Courts of Appeals. This Court required defendants to demonstrate that counsel's ineffectiveness worked to the accused's "actual and substantial disadvantage," a standard equivalent to the showing neces-

sary to prove "prejudice" under *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). *See Washington v. Strickland*, 693 F.2d 1243 (5th Cir.Unit B 1983)(en banc), *reversed*, ___ U.S. ___, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). On the other hand, the District of Columbia Circuit imposed on the accused "the initial burden of demonstrating a likelihood that counsel's inadequacy affected the outcome of the trial." *United States v. Decoster*, 624 F.2d 196, 208 (D.C.Cir.1979)(en banc). The Supreme Court in *Strickland* announced a formulation that appears to impose upon the accused a burden of showing prejudice that is somewhat heavier than the burden previously imposed by this Court but less onerous than the *Decoster* standard. The Court held that "[i]t is not enough for the defendant to show that errors had some conceivable effect on the outcome of the

proceeding." ___ U.S. at ___, 104 S.Ct. at 2067-2068. "On the other hand, we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case." *Id.* Instead, the Court held, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at ___, 104 S.Ct. at 2068. The Court also emphasized that a substantial burden of proof rests on a defendant who advances such a claim; the challenged proceeding enjoys a "strong presumption of reliability." *Id.* at ___, 104 S.Ct. at 2069.

The *Strickland* standard appears, in theory at least, to require courts to focus

more on the effect that counsel's ineffectiveness may have had on the *outcome* of the accused's trial than did this Court's previous prejudice test. Nevertheless, an accused need not demonstrate that counsel's errors are *likely* to have altered the result but only that there is a reasonable probability that the outcome was affected. It is not yet clear what difference, if any, these distinctions will make in practice, *see* ___ U.S. at ___, 104 S.Ct. at 2069 (differences among various tests "should alter the merit of an ineffectiveness claim only in the rarest case"), but *Strickland* has, in any event, given us a new focus of analysis.

[2] We find that Boykins has failed to show that there is a reasonable probability that the alleged inadequacies of his counsel altered the outcome of his trial. In his submissions to this Court, Boykins has

made little, if any, attempt to demonstrate how his attorney's alleged errors prejudiced him. Boykins has not demonstrated how Cosgrove's failure to interview the prosecution experts may have altered the outcome of the trial. Moreover, this alleged error is insufficient to undermine our confidence in the result of the state criminal proceeding. The same is true for Cosgrove's failure to produce lay experts who would testify to Boykins's mental and emotional state around the time of the robbery. As Cosgrove testified before the district court, the insanity issue became essentially a "battle of experts." Although the introduction of lay testimony might have been helpful, in the circumstances of this case it was not required in order to avoid a "breakdown in the adversary process that renders the result unreliable." Moreover, had the trial court permitted Boykins's experts to testify fully, an issue that we

discuss below, significant evidence regarding the defendant's history of mental illness would have been presented to the jury. Finally, we cannot conclude that Cosgrove's failure to demand a pretrial competency hearing had any reasonably probable effect on the outcome of the trial. All the available psychiatric reports concluded that Boykins was competent to stand trial. At most Boykins has claimed that his counsel's alleged errors "had some conceivable effect on the outcome" of his trial; such a claim is "not enough." ___ U.S. at ___, 104 S.Ct. at 2067-2068.

II. LIMITATION OF DR. RODRIGUEZ'S TESTIMONY

[3-5] The trial court excluded as irrelevant Dr. Rodriguez's testimony relating to Boykins's previous history of mental illness. The petitioner contends that this ruling was incorrect as a matter of

evidence law and that it denied him the right to present witnesses in his own defense and therefore violated the requirements of due process. Federal courts reviewing habeas corpus petitions are not empowered to correct erroneous evidence rulings of state trial courts. *Phillips v. Wainwright*, 624 F.2d 585, 589 (5th Cir. 1980);[1] *Woods v. Estelle*, 547 F.2d 269, 271 (5th Cir.), *cert.denied*, 434 U.S. 902, 98 S.Ct. 297, 54 L.Ed.2d 188 (1977); *Hills v. Henderson*, 529 F.2d 397, 400-01 (5th Cir.), *cert.denied*, 429 U.S. 850, 97 S.Ct. 139, 50 L.Ed.2d 124 (1976). Moreover, states deserve wide latitude to fashion

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1 In *Bonner v. City of Prichard*, 661 F. 2d 1206 (11th Cir.1981)(en banc), the Eleventh Circuit has adopted the case law of the former Fifth Circuit handed down as of September 30, 1981, which is binding unless and until overruled by this Court en banc.

their own evidentiary rules. *Maness v. Wainwright*, 512 F.2d 88, 92 (5th Cir.1975); *Bassett v. Smith*, 464 F.2d 347, 351 (5th Cir.1972), *cert.denied* 410 U.S. 991, 93 S.Ct. 1509, 36 L.Ed.2d 190 (1973). Nevertheless, when a state trial court's evidence rulings deny a habeas petitioner fundamental constitutional protections, this Court's duty requires it to enforce the constitution's guarantees by granting the petition for a writ of habeas corpus.

[6] The right to present witnesses in one's own defense in a criminal trial lies at the core of the Fifth and Fourteenth Amendments' guarantee of due process of law. *Faretta v. California*, 422 U.S. 806, 818, 95 S.Ct. 2525, 2532, 45 L.Ed.2d 562 (1975); *Santobello v. New York*, 404 U.S. 257, 264, 92 S.Ct. 495, 499, 30 L.Ed.2d 427 (1971) (Douglas, J. concurring); *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct.

1920, 1923, 19 L.Ed.2d 1019 (1967). As the Chief Justice has written, "[t]he right to the production of all evidence at a criminal trial similarly has constitutional dimensions.... [T]he Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced." This right had perhaps its clearest expression in *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). There the trial court's strict application of Mississippi's hearsay rules had barred the defendant from introducing testimony of several witnesses who had heard another confess to the crime. The Court, stating "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense," id. at 302, 93 S.Ct. at

1049, held that the ruling of the trial judge violated due process. After finding the evidence relevant and trustworthy, the Court discounted any state interest in excluding the hearsay. It then held that the ruling deprived the defendant of a fair trial and reversed the conviction. *Id.* at 303, 93 S.Ct. at 1049. *See also Green v. Georgia*, 442 U.S. 95, 97, 99 S.Ct. 2150, 2151, 60 L.Ed.2d 738 (1979) (per curian) (exclusion of evidence "highly relevant to a critical issue" in the punishment phase of a capital trial when "substantial reasons existed to assume its reliability" violated dur process).

[7] This Court and its predecessor have demonstrated a proper reluctance to second-guess state court evidentiary rulings on habeas review, rarely granting relief on the basis of such rulings. See Shaw v. Boney, 695 F.2d 528, 530 (11th Cir.1983), but see Panzavecchia v. Wainwright, 658

F.2d 337, 341 (5th Cir.1981). Nevertheless, we have consistently stated that where a trial court's evidence ruling renders a state criminal proceeding fundamentally unfair the petitioner is entitled to relief. Osborne v. Wainwright, 720 F.2d 1237, 1238 (11th Cir.1983); Shaw v.Boney, 695 F.2d at 530; Dickson v. Wainwright, 683 F.2d 348, 350 (11th Cir.1982); DeBenedictis v. Wainwright, 674 F.2d 841, 843 (11th Cir,1982); Hills v. Henderson, 529 F.2d at 401. Fundamental fairness is violated when the eivdence excluded is "material in the sense of a crucial, critical, highly significant factor." Osborne v. Wainwright, 720 F.2d at 1238; Shaw v. Boney, 695 F.2d at 530; Hills v. Henderson, 529 F.2d at 401; see also Barnard v. Henderson, 514 F.2d 744, 745-46 (5th Cir.1975) (suggesting that exclusion of testimony to the effect that the accused had not been in a certain bar the night of a murder where prosecution

case depended heavily on testimony that the accused had been arguing with the victim in the bar just before the murder, violated fundamental fairness).

[8] We hold that Dr. Rodriguez's excluded testimony was material in that it was a crucial, critical, highly significant factor in Boykins's defense. Boykins's sole defense at trial was insanity. The record indicates that Dr. Rodriguez would have testified that he had treated Boykins for three years while Boykins was a patient at Chattahoochee. He would have identified Boykins's condition as paranoid schizophrenia, an incurable disorder subject to remission and unpredictable relapse. He would have been able to relate to the jury the past effects of the disease on Boykins's behavior so that the jurors might have compared Boykins's prior symptoms to his actions on the day of the robbery. Moreover, where Dr. Rodriguez had extensive experience with Boykins, the other experts

all based their opinions on single one-hour interviews. This Court has frequently stressed the importance of permitting introduction of all evidence relating to the issue of insanity. See United States v. McRary, 616 F.2d 181, 184 (5th Cir.1980); United States v. Davis, 523 F.2d 1265, 1267 (5th Cir.1975). In Gordon v. United States, 438 F.2d 858 (5th Cir., cert.denied, 404 U.S. 828, 92 S.Ct. 139, 30 L.Ed.2d 56 (1971), the Court stated that "[i]n resolving the complex issue of criminal responsibility it is of critical importance that the defendant's entire relevant symptomatology be brought before the jury and explained." Id. at 883 (emphasis added). Such evidence as was contained in Dr. Rodriguez's testimony clearly meets the constitutional standard of materiality in the sense of a "crucial, critical, highly significant factor."

The State has advanced no competing interest in excluding Dr. Rodriguez's testi-

mony. Nor does any spring to mind. As we have already observed, the evidence, more than merely relevant, was crucial to the jury's accurate resolution of the petitioner's sanity at the time of the crime. Furthermore, there is no suggestion that Dr. Rodriguez's testimony lacked trustworthiness. On the contrary, of all the experts who testified, Dr. Rodriguez was the most intimately familiar with Boykins's condition.[2]

[9] The State does not contest the merits of this claim. Instead, it contends that

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2 The district court held that the restriction of Dr. Rodriguez's testimony was harmless error. Of course, this holding conflicts with out finding that the evidence was critical to Boykins's defense and with the precedent of this Circuit emphasizing the importance of psychiatric history to any determination of insanity. Where the substantive standard of constitutional error contains a requirement that the excluded evidence be "crucial, critical, highly significant" the harmless error doctrine is inapplicable. See United States v. Hammond, 598 F.2d 1008, 1013 (5th Cir.1979) (violation of the constitutional guarantee that an accused be able to present witnesses in his own defense is prejudicial per se).

because Boykins raised only the state evidence aspect and not the constitutional aspect of the trial court's limitation of Dr. Rodriguez's testimony on direct appeal, the petitioner has both failed to exhaust state remedies with regard to the constitutional claim and has waived that claim through procedural default. See Anderson v. Harless, 459 U.S. 4, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982)(per curiam). The state did not raise this issue before the district court,[3] nor

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At oral argument before this Court, the State claimed that it had raised the waiver issue before the district court in its motion to strike. That motion did assert that certain of Boykins's claims had been waived, but did not identify those claims except by reference to Boykins's state habeas petition in which he acknowledged not having pursued certain arguments on direct appeal. His "Rodriguez" claim was not among those he admitted to have neglected. The State's motion to strike did not attempt to explain the distinction between Boykins's state evidence law claim, which he did raise on direct appeal, and his federal constitutional claim. Consequently, we are unwilling to hold that Boykins has forfeited his right to raise the constitutional claim because he made the same error on direct appeal.

did the district court consider the exhaustion/waiver question in disposing of the case. The State's failure to raise either the exhaustion or procedural default arguments in the district court bars it from prevailing on those claims in the Court of Appeals. Washington v. Watkins, 655 F.2d 1346, 1368 (5th Cir.1981) (waiver); Hopkins v. Jarvis, 648 F.2d 981, 983 n. 2 (5th Cir.1981) (exhaustion); LaRoche v. Wainwright, 599 F.2d 722, 724 (5th Cir. 1979)(waiver); Messelt v. Alabama, 595 F.2d 247, 250-51 (5th Cir.1979)(exhaustion); West v. Louisiana, 478 F.2d 1026, 1034-35 (5th Cir.1973)(exhaustion), aff'd in pertinent part en banc, 510 F.2d 363 (5th Cir. 1975). See also Grooms v. Wainwright, 610 F.2d 344, 347 (5th Cir.(where district court decided issue on the merits without objection from the state, appellate court will reach merits on appeal although petitioner did not properly exhaust state remedies), cert. denied, 445 U.S. 953, 100 S.Ct. 1605, 63 L.Ed.2d 789 (1980).

III. REMAINING ISSUES

[10] The Petitioner further claims that the trial court erred in refusing to instruct the jury on the consequences of a verdict of not guilty by reason of insanity. Although the trial court's ruling appears to have been an erroneous application of Florida law, see Roberts v. State, 335 So.2d 285, 287 (Fla.1976), we are unwilling to hold that this error denied the petitioner a fundamentally fair trial.

[11] The petitioner's remaining contentions, that the prosecutor's closing argument was impermissibly prejudicial and that the petitioner was denied an evidentiary hearing to determine his competency to stand trial, were not argued on direct appeal, and Boykins has therefore waived them. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Here the State preserved its waiver claims by raising them before the district court. Our review of the record convinces us that

the petitioner's claim that he alleged cause and prejudice before the district court is without merit.

Because the trial court's limitation of the scope of Boykins's witness's testimony amounted to a denial of due process, we REVERSE and REMAND to the district court with instructions to grant the petitioner's application for a writ of habeas corpus.

LYNNE, District Judge, concurring and dissenting:

While I concur in Parts I and III of the opinion, I cannot join in Part II. I, of course, agree with the general rule that federal courts reviewing habeas corpus petitions are not empowered to correct erroneous evidence rulings of state trial courts and that there is a well recognized exception thereto; that fundamental fairness is violated and due process denied when the evidence excluded is material in the sense of a crucial, critical, highly significant factor. In its treatment of the facts re-

vealed by the record, the court allows the exception to swallow the rule.

Since Boykins was caught red-handed in the perpetration of an armed robbery, it is not surprising that his only asserted defense was insanity. A fair reading of the record compels the court's conclusion that the state trial court committed error in excluding testimony of Dr. Rodriguez of mental problems experienced by Boykins while undergoing his treatment at Chattahoochee over a three year period. If that were the end of the matter my dissent would not be provoked.

But there is much more which leads me ineluctably to the conclusion that such error, while perhpas not harmless, was assuredly not of constitutional magnitude. In the presence of the jury, Dr. Rodriguez testified without objection:

1. That he is a psychiatrist from Florida State Hospital (R 162);

2. That Boykins was his patient for three years (R 163);

3. That in a report to general staff of Chattahoochee, on September 5, 1972, he recommended that [Boykins] be adjudicated competent and released from Chattahoochee (R 184);

4. That [Boykins] was adjudicated competent and released from Chattahoochee in January 1973, the last time he talked to him (R 184);

5. That it is possible that a psychotic patient who is later adjudged competent will again become psychotic, and it is possible he will stay in remission for the rest of his life; that he could not say for sure, and that a schizophrenic is always a schizophrenic (R 189).

6. That on the basis of the hypothetical question put to him by defense counsel, which graphically described Boykins' behavior during the commission of the offense and immediately thereafter, it was his opinion that at that time he was psychotic and did not know right from wrong (R 183), and

7. That his opinion was based upon the hypothetical posed to him by defense counsel and his previous experience with him (R 187).

The colloquy between court and counsel out of the presence of the jury is revealing (R 164-181). Apparently the judge was confused as to the purpose for which the testi-

mony of Dr. Rodriguez was sought to be offered. Seemingly, he jumped to the erroneous conclusion that Mr. Cosgrove was attempting to lay a predicate, based upon his treatment of Boykins over a period of three years at Chattahoochee, to qualify him as an expert with respect to the defendant's mental condition at the time of the offense.

With an eye too single upon this misconception and prodded by the artless objection of the prosecutor, he failed to come to grips with the relevancy of the evidence for the true purpose for which it was being offered, as revealed in the following dialogue:

> THE COURT: In January, 1973, the doctor found him to be competent.
>
> MR. COSGROVE: Yes, I understand that, my purpose in bringing Dr. Rodriguez here is not at all to seek testimony as to his opinion regarding incompetency of this offense, I don't think that would be possible. My purpose is, too, which I think is relevant, as to pointing out to the jury that this man has had very severe mental problems in the very recent past. As he will testify, the dis-

> order that Mr. Boykins had is a reoccurring [sic] disorder. Even after he's adjudged competent, which is a very tentative thing, could reoccur [sic] at any time. It's entirely unpredictable and I think that's highly relevant.

Finally, the jury heard the testimony of four psychiatrists; two in behalf of Boykins; two called by the state. They were informed that Dr. Rodriguez, who expressed the opinion that Boykins was insane at the time the offense was committed, had treated him as a mental patient for three years, and that Dr. Miller, who expressed the same opinion after a brief interview, had been appointed by the court to determine his competency to participate in his own defense. For the state, both Dr. Barnard and Dr. Carrera, each of whom testified that he had examined Boykins for approximately one hour, expressed the opinion that he was competent at the time of the offense.

I share the sensitivity of my colleagues to the constitutional imperative that every

defendant in a criminal case be accorded a fair trial. I part company with them because my reading of the cold record convinces me beyond peradventure that Boykins' trial was not lacking in fundamental fairness. I would not require another after the lapse of eleven years. I respectfully dissent.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

OSCAR BROWN BOYKINS, JR., #A040496

Petitioner,

vs. Case No. 79-1042-Civ-J-M

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,
State of Florida,

Respondent.

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ORDER

This cause is before the Court upon the Petition for Writ of Habeas Corpus, filed herein on November 21, 1979, by petitioner Oscar Brown Boykins, Jr., pursuant to 28 U.S.C. §2254 (1976).

This matter was considered by the United States Magistrate, pursuant to standing order concerning assignment of state prisoner habeas corpus cases. The Magistrate filed a Report and

Recommendation May 26, 1982 recommending that the petition be dismissed because petitioner has failed to meet the requisite burden of proof and for other reasons stated in his Report and Recommendation. Petitioner filed written objections to the Report and Recommendation on June 4, 1982; respondent filed a response to petitioner's objections on June 15, 1982.

Upon consideration of the Report and Recommendation of the Magistrate, the written objections thereto filed by petitioner, and the response to petitioner's objections filed by respondent and upon this Court's de novo review of the entire file, it is

ADJUDGED:

1. That petitioner's objections to the Magistrate's Report and Recommendation are hereby overruled;

2. That the Magistrate's Report and Recommendation is hereby adopted, confirmed, and made a part hereof;

3. That the Petition for Writ of Habeas Corpus is hereby denied; and

4. That the Clerk shall enter Judgment dismissing this action.

ORDERED at Jacksonville, Florida, this 16th day of August, 1982.

UNITED STATES DISTRICT JUDGE

Copies to:

Hon. Paul Game Jr.
United States Magistrate

Archibald J. Thomas, III
Assistant Public Defender

Lawrence A. Kaden
Assistant Atty. General

Oscar BOYKIN, Appellant,

v.

STATE of Florida, Appellee.

No. LL-494.

District Court of Appeal of Florida, First District.

September 25, 1979.

Oscar Boykin, in pro. per., for appellant.

No appearance for appellee.

PER CURIAM.

Boykin appeals the summary denial of this 3.850 motion. All grounds, save one, could have been or were raised on direct appeal. Ashley v. State, 350 So.2d 839 (Fla. 1st DCA 1977). Boykin also alleges ineffective assistance of appointed counsel. However, after reviewing the trial transcript it clearly appears that trial counsel rendered reasonably effective assistance under the circumstances and none of the actions taken by trial counsel reduced the proceedings to a farce and mockery of justice. Foxworth v. State, 267 So.2d 647 (Fla. 1972), cert. denied, 411 U.S. 987, 93 S.Ct. 2276, 36 L.Ed.2d 965 (1973).

AFFIRMED.

MILLS, C.J., and ROBERT P. SMITH, JR. and LARRY G. SMITH, JJ., concurr.

Oscar BOYKIN, Appellant,

v.

STATE of Florida, Appellee.

No. V-106.

District Court of Appeal of Florida, First District.

January 9, 1975.

Louis O. Frost, Jr., Public Defender, and James O. Brecher, Asst. Public Defender, for appellant.

Robert L. Shevin, Atty. Gen., and Michael M. Corin, Asst. Atty. Gen., for appellee.

PER CURIAM.

Appellant seeks reversal of his conviction and sentence after being found guilty by a jury on charges of robbery.

We have given full consideration to the record, briefs and oral argument of the parties. It appearing therefrom that appellant has failed to demonstrate that prejudicial error was committed in the proceedings below, the judgment and sentence appealed herein is affirmed. Specifically, with reference to appellant's allegation that the trial court erred in refusing to instruct the jury on applicable penalties, we rely upon the recent Florida Supreme Court case of Johnson v. State, 308 So.2d 38, Opinion filed December 11, 1974, which held that the provisions of Criminal

Procedure Rule 3.390(a), requiring the trial judge to charge the jury on the penalty fixed by law for the offense for which the accused is then on trial, is directory and not mandatory.

Affirmed.

JOHNSON, Acting C.J., McCORD, J., and MASON, ERNEST E., Associate Judge, concur.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

OSCAR BROWN BOYKINS, JR.,

Petitioner,

vs. Case No. 79-1042-Civ-J-M

LOUIE L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation, State of Florida,

Respondent.

_____/

MOTION TO STRIKE

Comes now Respondent, Louie L. Wainwright, pursuant to Federal Rule of Civil Procedure 12(f), by and through his undersigned attorney, and would file this his Motion to Strike and as reasons therefore would show:

* * *

9. Applying the foregoing law to the case at hand, Respondent would submit that if Petitioner has raised issues

which were not raised on direct appeal and these issues could have been so raised, absent a showing of both "cause" and "prejudice", the issues are not proper grounds for habeas corpus relief. Petitioner readily concedes in his Motion for Post-Conviction Relief that Issues Two, Three, Four, and Five were not raised on direct appeal.

* * *

WHEREFORE, for the foregoing reasons, Respondent would respectfully request that this Court strike any issue raised in the Petition which could have been raised on direct appeal but was not. Specifically, Issues Two, Three, Four, and Five should be stricken pursuant to Sykes, Spinkellink, Timmbrek, and Lumpkin.

Respectfully submitted:

JIM SMITH
ATTORNEY GENERAL

By: _____
MIGUEL A. OLIVELLA, JR.
Assistant Attorney General

THE CAPITOL, Suite 1502
Tallahassee, Florida 32301
(904) 488-0600

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished to Mr. Oscar B. Boykins, #A-040496, Florida State Prison, Post Office Box 747/L-13-3110, Starke, Florida, 32091, by United States mail on this 28th day of January, 1980.

_____
MIGUEL A. OLIVELLA, JR.
Assistant Attorney General

OF COUNSEL

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

OSCAR BROWN BOYKINS, JR.,

Petitioner,

vs. Case No. 79-1042-Civ-J-M

LOUIE L. WAINWRIGHT, Secretary,
Offender Rehabilitation,
State of Florida,

Respondent.

_____/

PRE-EVIDENTIARY HEARING STIPULATION

Pursuant to this Court's order, the parties hereby submit the following pre-evidentiary hearing stipulation:

* * *

5. RESPONDENT'S CONTENTIONS:

Respondent denies each and every claim asserted by Petitioner.

Additionally, Respondent contends that Petitioner has previously waived all claims raised herein except the ineffec-

tive assistance of counsel claim. Said waiver resulted from Petitioner's failure to raise on direct appeal certain issues which were raised for the first time in a Rule 3.850 motion filed subsequent to the disposition of the direct appeal.

EXCERPTS FROM TRIAL TRANSCRIPT

MR. COSGROVE: [defense counsel] Yes, I understand that, my purpose in bringing Dr. Rodriguez here is not at all to seek testimony as to his opinion regarding incompetency of this offense, I don't think that would be possible. My purpose is, too, which I think is relevant, as to pointing out to the jury that this man has had very severe mental problems in the very recent past.

* * *

THE COURT: I don't think it's relevant to this case; I think he's right.

* * *

MR. COSGROVE: Your Honor, but I would submit to the Court what we are talking about, there is a psychiatrist or an expert called to render an opinion to that issue, that is, the issue you

have insanity at the time of the offense and that is not the purpose here.

* * *

(short recess)

THE COURT: Gentlemen.

MR. COSGROVE: Your Honor, I spent the last ten minutes discussing with my witness this case, that seemed the most important thing to do at this time and I have not looked for law regarding the matter we discussed earlier. However, I also talked to a senior of mine and I think you were right on the law.

EXCERPTS FROM APPELLANT'S INITIAL BRIEF

II. THE TRIAL COURT ERRED IN REFUSING TO ALLOW DR. RODRIGUEZ TO TESTIFY TO THE APPELLANT'S RECENT PAST MENTAL HISTORY AND TO THE NATURE OF THIS MENTAL ILLNESS.

The Appellant called Dr. Rodriguez for the purpose of "pointing out to the jury that (the Appellant) has had very severe mental problems in the very recent past. . . . (T)he disorder that (the Appellant) had is a reoccuring disorder. Even after he's adjudged competent, which is a very tentative thing, (it) could reoccur at any time. Its entirely unpredictable and I think that's highly relevant." (Tr 166). The trial court refused to allow this testimony because he felt it was irrelevant to the case at bar (Tr 167). This was error and the jury was deprived of highly relevant and probative testimony.

The test of relevancy is a requirement of probative value, whether the evidence (1) deals with issues in the case, and (2) tends to prove or disprove these issues. The sole jury issue in the case at bar was the Appellant's sanity. Dr. Rodriguez would testify that the Appellant's mental illness concerned a recurring illness and that the Appellant had recently been released after over three years in the state hospital in Chattahoochee for treatment of this illness. This evidence meets the test of relevancy.

In Butler v. State, 261 So. 2d 508 (1st DCA Fla. 1972), and Byrd v. State, 178 So. 2d 886 (2nd DCA Fla. 1965), cert. denied 118 So. 2d 318 (Fla. 1966), this Court and a sister court held that lay witnesses who had observed the defendant over a long period of time during

which he had suffered a mental disorder were competent to express their opinion as to sanity at the time of the offense and that this was relevant testimony. Certainly, Dr. Rodriguez, as an expert, would not be barred from voicing the same testimony as the defendant's sister in Butler or an old friend deputy sheriff in Byrd. The jury was deprived of highly relevant testimony in the case at bar, especially in light of the prosecutor's closing argument (Tr 280). The prosecutor argued to the jury that it was unreasonable for them to believe that the Appellant was incompetent at the time of the offense because he had been released from Chattahoochee. But this is exactly the issue to which Dr. Rodriguez testimony would go: the meaning of the release from Chattahoochee and the continuation of a recurring,

sometimes in and sometimes out, mental illness of the Appellant. The judgment must be reversed so that this relevant testimony may be presented to the fact-finder.